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GARY E. CRIPE CATHERINE M. GRAHAM

May 31, 1994

HAND DELIVERED

Martin Stern, Esq.
Cable Bureau
Federal Communications Commission
2033 M. Street, N.W.
Washington, D.C. 20554

Re: PP Docket No. 93-21

Dear Mr. Stern:

At your request please find enclosed the following documents filed on behalf of the plaintiff, Pappas Telecasting, Incorporated ("PTI"), in PTI v. Prime Ticket Network, et al, Case No. CV-F.92-5589-OWW:

1. PLAINTIFF'S RESPONSE TO DEFENDANT PAC-10'S STATEMENT OF MATERIAL FACTS; PLAINTIFF'S SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS IN DISPUTE;

2. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PAC-10 CONFERENCES SUMMARY JUDGMENT MOTION;

3. DECLARATIONS OF: DENNIS C. MUELLER, Ph.D; HARRY J.PAPPAS; LeBON ABERCROMBIE; LISÈ MARKHAM AND APOSTOLOS SIGUOURAS AND EXHIBITS ATTACHED THERETO IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND/OR DISMISSAL FILED BY DEFENDANTS THE PACIFIC-10 CONFERENCE; CAPITAL CITIES/ABC, INC., ESPN, INC., ABC SPORTS, INC. AND PRIME TICKET NETWORK;

4. DECLARATION OF GARY E. CRIPE IN OPPOSITION TO THE MOTIONS OF DEFENDANTS FOR SUMMARY JUDGMENT AND/OR DISMISSAL;

5. NOTICE OF FILING EXHIBITS "B" AND "C" TO DECLARATION OF LISÈ MARKHAM IN OPPOSITION TO THE MOTIONS OF DEFENDANTS FOR SUMMARY JUDGMENT AND/OR DISMISSAL.

I hope you find the enclosed documents helpful. Needless to say, I will be happy to answer any questions you may have.

Very truly yours,

GARY E. CRIPE

GEC/fpv
Enclosures

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Attorneys for Plaintiff PAPPAS TELECASTING, INC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAPPAS TELECASTING, INC. a California Corporation, and as Public Trustee, Plaintiff, -vs- PRIME TICKET NETWORK, a California Limited Partnership, CVN, INC., a Corporation, The PACIFIC-10 CONFERENCE, a California non-profit association, CAPITAL CITIES/ABC, INC., a Delaware Corporation, ESPN, INC., a Corporation, ABC SPORTS, INC., a New York Corporation, and DOES 1 through 20, inclusive, Defendants.	CASE NO. CV-F-92-5589-OWW DECLARATIONS OF: DENNIS C. MUELLER, Ph.D.; HARRY J. PAPPAS; LeBON ABERCROMBIE; LISÉ MARKHAM AND APOSTOLOS SIGUOURAS AND EXHIBITS ATTACHED THERETO IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND/OR DISMISSAL FILED BY DEFENDANTS THE PACIFIC-10 CONFERENCE; CAPITAL CITIES/ ABC, INC., ESPN, INC., ABC SPORTS, INC. AND PRIME TICKET NETWORK DATE: March 7, 1994 TIME: 10:00 A.M. ROOM: 2

GARY E. CRIPE, ESQ.
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UNITED STATES DISTRICT COURT

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PAPPAS TELECASTING, INC. a California Corporation, and as Public Trustee, Plaintiff, -vs- PRIME TICKET NETWORK, a California Limited Partnership, CVN, INC., a Corporation, The PACIFIC-10 CONFERENCE, a California non-profit association, CAPITAL CITIES/ABC, INC., a Delaware Corporation, ESPN, INC., a Corporation, ABC SPORTS, INC., a New York Corporation, and DOES 1 through 20, inclusive, Defendants.	CASE NO. CV-F-92-5589-OWW DECLARATION OF DENNIS C. MUELLER, Ph.D IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND/OR DISMISSAL FILED BY DEFENDANTS DATE: March 7, 1994 TIME: 10:00 a.m. ROOM: 2

I, Dennis C. Mueller, declare and state as follows:

GENERAL BACKGROUND

1. I received my Ph. D. in Economics from Princeton University in 1966. I am currently, and have been for the past

16 years, a professor of Economics at the University of Maryland. I have also held positions at the Science Center, Berlin, Cornell University, and the Brookings Institution. My areas of teaching and research specialization are public choice and industrial organization. In the latter area, I have written about the profitability of corporations, research and development, advertising, mergers, the social costs of monopoly, and anti-trust policy, among other topics. A complete summary of my publications and professional experience is contained in my Curriculum Vitae appended to this Declaration as Exhibit A. I have been President of the Public Choice Society, the Southern Economic Association, and the European Association for Research and Industrial Economics (E.A.R.I.E.), the Industrial Organization Society. I have from time to time testified before Congress on anti-trust and monopoly matters as summarized in my Curriculum Vitae.

NATURE OF THE PRODUCT MARKET

2. The relevant product is the right to transmit, by television, Division 1-A college football games. There are several methods of transmission (distribution) of the product.

3. Methods of distribution include broadcasting stations which send a signal generated by a transmitter which is received by the antennae of the homes within the broadcast signal of the station. These free over the air broadcast television stations can be independent stations free of any network affiliation, or affiliated with a network such as ABC, NBC, CBS, or the Fox Network. Another method of distribution is cable television. The consumer receives television reception via a cable which

attaches to the television set. A third method of distribution is via satellite in which the signal from television stations is received by the satellite and beamed back to earth where it is, in turn, received by a satellite dish connected to the viewer's television set.

4. Irrespective of the method of distribution, the broadcasters, cablecasters, or satellite distributors must compete with one another for the rights to distribute these games to the viewers they serve. For example, defendant PAC-Ten Conference ("PAC-10"), pursuant to its mandate from its constituent members has been delegated the authority by its members to negotiate, with both broadcasters and cablecasters the terms and conditions of television contracts for the rights to telecast or cablecast college football games in which members of the PAC-10 would be involved. (Declaration of Thomas C. Hansen, p. 2, lines 10-14)

5. Broadcasters such as CapCities/ABC, Inc. ("ABC"), ABC network[1], individual stations such as KMPH-TV, owned and operated by plaintiff herein pursuant to a FCC license, cable sports networks like defendant ESPN and Prime Ticket Network ("PTN") all compete with one another for the right to transmit Division 1-A college football games.

6. These distributors, in turn, receive compensation for providing the product to the consumers of the product who are the actual and potential viewers of these games. Compensation is

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[1] ABC both owns stations outright and has affiliate agreements with stations in various geographic locations in the United States.

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derived by broadcasters by selling commercial time to individuals or entities who have products or services they wish to expose to the consuming public in hopes of generating greater sales of the product or service. Cablecasters, on the other hand, derive revenues from two sources. They sell commercial time and they also receive fees from subscribers who subscribe to their cable service.

7. The product and market are unique in that the consumer does not pay the broadcaster directly, and in cash, for the product he consumes as he would when buying tooth paste at a drug store. He pays first of all with his time, which is given up not only to watch the football game but, most importantly, the commercials of its sponsors. He pays the cablecaster directly for those games carried over cable channels by his subscription fee for cable television. He may also indirectly pay for the game by purchasing one of the products advertised during the game he watches at a price which exceeds the cost of producing it. Typically, the price of the goods or services being advertised will include not only production costs and overhead, but also other costs including the costs of advertising and marketing.

8. The product is highly differentiated with some of the differentiation having an important geographic component. A University of Maryland v. North Carolina game broadcast in California is not a perfect substitute for a UCLA v. University of California broadcast in California. Similarly, for the fans of the Fresno State University Bulldog football team even a game involving such traditional powerhouses as Notre Dame and Michigan may not be a perfect substitute. For example, on Saturday,

September 15, 1990, Fresno State played Utah which was telecast by KMPH. Notre Dame v. Michigan was telecast on a competitive station, KJEO, and the ratings and share for the FSU v. Utah game were substantially higher than they were for Notre Dame v. Michigan. FSU v. Utah had a 12 rating and a 30 share. Whereas Notre Dame v. Michigan had a 4 rating and a 10 share. While this single example is, by no means conclusive, it is illustrative of the point. Moreover, a UCLA v. University of California game broadcast in California six hours after it has been played is not a perfect substitute for the same game broadcast live.

9. Consumers of televised football games cannot reveal their demand for this product, as they can for tooth paste, by simply going to the drug store and requesting some. Television broadcasting has strong joint supply properties. In other words, each consumer cannot decide independently if and when he or she wants to watch a game. Nor is it feasible for consumers to get together and contract directly with the teams playing to have the game televised. To effectuate the demand by viewers for televising particular games, independent stations or networks of stations must first determine whether there will be a sufficient number of viewers to induce advertisers to sponsor the game, arrange the advertising if there will be sufficient demand, contract for the right to televise the game, and then actually televise it. Thus, although the distributors (broadcasters and cablecasters) are not the ultimate consumers of the product, independent stations and networks play a crucial role in the working of this market, because it is only through them that the demand for televised games by their viewers can be effectuated.

If potential broadcasters of televised football games are prevented from broadcasting them, both potential viewers and the broadcasters suffer the loss. This symbiotic relationship between broadcasters and potential viewers has been recognized by the Federal Communications Commission.

> "In the fulfillment of his obligation, the broadcaster should consider the space, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interest on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs of the areas they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.
>
> "The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: . . ., (12) sports programs, . . ."[2]

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[Emphasis added]

THE ALLEGED ANTI-TRUST VIOLATION

10. A Section 1 Sherman Act case frequently involves a group of producers, say of tooth paste, who agree to prices for the products that are above those that normal competition would produce. In response to this action some consumers would continue to buy the tooth paste of the cartel members, but in smaller quantities - perhaps they would brush their teeth only every other day. Others might switch to other brands, if any manufacturers are not part of the cartel, or to inferior substitutes like baking soda. Others might cease brushing their teeth altogether.

11. The social cost of the cartel is the loss in welfare from those who are forced to switch to inferior substitutes or do not consume the product at all because of its higher price. The social cost of the cartel is the loss in consumers' surplus in the units of the products not sold as a result of the cartel.[3] If one wants to determine the social loss from a particular practice or contractual arrangement, one looks to the units not sold because of the arrangement.

12. We can think of the market to rights to televise Division I-A football games as consisting of potentially

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[2] En Banc Programming Inquiry Before the Federal Communications Commission, FCS 60-970-91874 Public Notice-B July 29, 1960.

[3] The social cost could also include the transfers resulting from the higher prices, from those who continue to consume the product at the higher price, to its producers.

approximately 107 sellers, the 107 or so schools which the NCAA places in Division I-A. Television rights lie with the home team. Arguably, there are some transaction cost savings to having the home team contract for the televising of a game, and all schools seem to have adopted this convention. Thus, on any given Saturday, there are approximately 50, or so, I-A games that might be sold for television, of which on average five will involve a PAC-10 team as the potential seller. The contracts between the PAC-10 and Big-10 and ABC ("PAC-10/Big-10/ABC contract"), the contract between the PAC-10 and PTN and PTN's sublicense agreement with ESPN ("PTN/ESPN contract") prohibits conference members from contracting to have one of its home games televised, if that game would overlap one of the games selected by ABC, PTN or ESPN (the PTN/ESPN contract applies to PAC-10 members only) by more than 45 minutes at the beginning of the game or 45 minutes at the end of the game.

13. Since the games that ABC, PTN and ESPN televise do not overlap, and the games they choose to televise are typically at the most popular times at which college football games are played, it must often be the case that the selections by ABC, PTN and ESPN prevent two, three or more other games from being televised.

14. There are four (4) time exclusivity windows of approximately three and one half (3½) hours each. These time exclusivity windows commence at 9:45 A.M., 12:30 P.M., 3:30 P.M. and 7:00 P.M.[4] For games originating on the west coast the 9:45

[4] All time references are to Pacific Standard Time (PST).

A.M. window is not a viable window because games are not scheduled that early. (Deposition of Thomas Hansen, p. 100, lines 5-11)

15. The PAC-10/Big-10/ABC contract and PTN/ESPN contract permitted, in 1991, that on any given Saturday each of the four exclusivity windows could be filled with a game telecast or cablecast by ABC, PTN and ESPN. In 1991, this could occur on any given Saturday, but on only two Saturdays during the 1991 season. However, on three Saturdays during 1991, ABC could have elected to show two (2) or more PAC-10 home games, two (2) or more Big-10 games, or a combination thereof, in two separate time exclusivity windows. Combined with a another game cablecast by PTN or ESPN three windows would be filled on at least three Saturdays, and as previously stated, the 9:45 window is not a viable alternative for a west coast game.

16. Therefore, as a result of the PAC-10/Big-10/ABC and PTN/ESPN contracts on any given Saturday as many as four exclusivity windows will be filled ABC, PTN and ESPN. On virtually all Saturdays two windows will be filled, and on other Saturdays three windows will be filled by these three (3) vendors and the earliest window (9:45 A.M. PST) is impractical for a game originating on the west coast.

17. The net effect is that these contracts are anti-competitive because they prevent the television rights for games that cannot be shown during these exclusivity periods from being sold. The social costs of the contract are measured by the losses imposed on those individuals who are denied the opportunity to acquire the rights to those games and those

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individuals who are denied the opportunity to watch the games that would have been televised, if these contracts did not prevent them from being televised.

18. The present lawsuit cites several examples of situations in which local broadcasters and their viewers have been denied the opportunity to televise games. Included among these examples are the two games scheduled to be telecast live by KMPH on September 14, 1991 and September 21, 1991, respectively. In addition, plaintiff cites other examples of situations in which local broadcasters have experienced a significant decrease in the number of games they have been allowed to televise (plaintiff's Second Amended Complaint, ¶¶ 92-94). I have reviewed the "Comments of The Association Of Independent Television Station, Inc." before the FCC which confirms the inability of KCBQ-TV to broadcast University of Washington and Washington State games and KUTP-TV's inability to broadcast University of Arizona games.[5]

19. Further, plaintiff has undertaken a market study, which I have reviewed and upon which I have relied, of the 17 principal television markets which cover the PAC-10 teams and the Big-10 teams. When this market study is considered in light of two critical events: (1) the NCAA decision of 1984; (2) The PAC-10/ Big-10/ABC contract and the Joint Venture Agreement between and among the PAC-10 Conference, the Big-10 Conference, and ABC covering the 1987, 1988, 1989, and 1990 football seasons (and as

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[5] Comments of the Association of Independent Television Stations, Inc. pp. 10-13.

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extended); the market study conducted by plaintiff demonstrates the following: (1) that prior to the NCAA decision local stations exhibited 68 exposures; (2) in 1985 (the year after the NCAA decision), the local television stations exhibited 115 exposures; (3) in 1986 the local television stations exhibited 120 exposures; (4) in 1987 the total number of local exposures in these 17 markets dropped to 65; (5) and over the ensuing six years, between 1988 and 1993, the local exposures decreased each year to a total of 24 in 1993.[6]

20. Further, the market study conducted by plaintiff also demonstrates that fewer games involving the home teams for these 17 principal television markets were telecast live subsequent to 1987.

21. At least since 1984 executives of ABC have consistently insisted on time period exclusivity (Deposition of Thomas Hansen, p. 69-line 9, p. 70, line 24). Further, ABC has explained its rationale for insisting on time period exclusivity to the PAC-10 Conference:

> "Q And did the folks at ABC explain to you at any time why they believed time period exclusivity was so important to them?
>
> "A Yes, because it would increase the ratings and, therefore, enhance their ability to sell the programming to advertisers.

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[6] The methodology utilized by plaintiff defines an exposure as a game shown in a market. Since a game may have been shown in one, or more, markets, the numbers include duplications. Further, the study compiles data for the November rating period (four (4) weeks for 1984-1993.

"Q And did they also explain to you why that would adhere [sic] to the benefit of the PAC-10 Conference?

"A Yes, increased ratings, increased sales, would benefit ABC, and it would be better able to participate in the future in an agreement with us.

"Q Well, I mean, they made it pretty clear to you if they were able to garner higher ratings and, therefore, sell advertising minutes for more money, they could afford to pay the PAC-10 Conference more money for the exposures they contracted for them; fair enough?

"A If there was a future agreement, yes."

(Deposition of Tom Hansen, p. 71, lines 5-21)

The statements made by ABC to Mr. Hansen are consistent with statements attributable to ABC executive, Charles Lavery, and ESPN executive, Herbert Granath [Second Amended Complaint, ¶ 69].

22. Professor Ordover, who submitted a Declaration in support of the motion filed by the PAC-10 Conference, regards "The most important [business reason for the exclusivity clause to be] to protect the higher tiered buyers [ABC, PTN and ESPN] from having their audience for the games they selected for broadcast diverted by another game within the control of the seller" (Ordover Declaration, ¶20, p. 8). Obviously, the exclusivity clauses in the PAC-10/Big-10/ABC and PTN/ESPN contracts are important to the parties not because they prevented only the two games sought to be telecast by KMPH, or only the games sought to be telecast by KCPQ and KUTP. Rather, if the exclusivity clause offers important protection to ABC, PTN and ESPN against having their audience diverted to other games, then

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it must prevent a significant number of games from being televised in competition with the ABC, PTN, ESPN games.

23. The statistically significant results of the market study conducted by plaintiff indicate that the exclusivity provisions of the contracts afford ABC, PTN and ESPN the protection described by Professor Ordover. Since the exclusivity provisions of these contracts prevent a significant number of games from being televised, they result in a significant reduction in output. Moreover, as the rationale was explained to the Commissioner of the PAC-10, Tom Hansen, by ABC, the exclusivity provisions also allow for a significant increase in price to be paid to the PAC-10. Therefore, the exclusivity provisions, since they restrict output and increase price, cause a significant anti-competitive effect.

"PER SE" VS. "RULE OF REASON"

24. Based upon my training and experience in the fields of monopoly and anti-trust, agreements that have as their primary objective and effect restrictions on output and price, which will raise the income of the parties to the agreement, have generally been regarded as illegal "per se" by the courts. The exclusivity features of the PAC-10/Big-10/ABC and PTN/ESPN contracts protect ABC, PTN and ESPN from competition in broadcasting or cablecasting Big-10 and/or PAC-10 games, and thus allow them to charge their advertisers higher fees as indicated above.

25. Further, ABC has made no pretense about wishing to limit head to head competition.

"Q It's your understanding that one of the important aspects of the exclusivity provisions for ABC, and

they've so told you in substance or effect, is to limit head to head competition for college football games? In other words, in order to get those higher ratings, they don't want another PAC-10 game being shown at the same time?

"A They do not want that, yes.

"Q And that's a limit on head to head competition, isn't it?

"A In a particular time period, it is." (Hansen Deposition, p. 73, line 20 through p. 74, line 43)

The obvious reason why ABC, PTN and ESPN would wish to limit head to head competition is illustrated by the earlier example of the local FSU game getting higher ratings than the Notre Dame v. Michigan game. ABC, PTN and ESPN are trying to protect themselves against the fact that games of local interest, frequently, derive higher ratings than do games of national interest. (Deposition of Thomas Hansen, p. 74, lines 17-26 through p. 75, line 5)

26. The additional revenue earned by ABC, PTN and ESPN allows them to pay the PAC-10 and Big-10 schools more for the rights to televise their games. The contracts raise revenues for the benefit of ABC, PTN and ESPN, the PAC-10 and the Big-10 by restricting output. They have the essential features of the kind of cartel agreement that the courts have commonly ruled to be "per se" illegal.

27. The PAC-10/Big-10/ABC and PTN/ESPN contracts resemble the NCAA/ABC contract, which the Court ruled in 1984 was in violation of the Sherman Act. In that case the Court chose to

apply the "rule of reason" rather than the "per se" rule. There are several reasons why the "rule of reason" might have been the appropriate standard to apply in the NCAA case in 1984, and yet the "per se" rule is appropriate in this case in 1994.

(a) The NCAA is the umbrella organization to which all colleges belong. It is responsible for establishing and policing rules regarding recruitment and eligibility of athletes, practice times, season lengths and a variety of questions related to preserving the amateur status of college sports, and the competitive as well as the economic health of college athletic programs. Prior to the case, the courts may have had good reason to believe that the achievement of many of these nonpecuniary goals of the NCAA were intertwined with the terms of the NCAA/ABC contract.

(b) In particular, in defense of the contract restricting the ability of NCAA members to sell the rights to televise their games, it was argued that an increase in the number of games on television would have an adverse effect on live attendance at college games. The District Court rejected this argument and the Supreme Court concurred in this judgment.

(c) Another nonpecuniary benefit claimed for the contract was that it helped to maintain "competitive balance" across colleges and universities of different calibers by assuring that weaker schools appeared on television. The Court also rejected this argument.

28. PAC-10 universities are a part of the NCAA and are governed by its rules. One can rely on the NCAA to maintain its nonpecuniary goals with respect to the PAC-10 schools independent

of the television contracts the PAC-10 joins. (Deposition of Thomas Hansen, p. 36, line 15 through p. 38, line 12)

29. The present suit does not challenge the PAC-10 as an association of colleges or any of its practices other than those defined by its contracts with ABC and PTN (and sublicense with ESPN), and in particular the exclusivity clauses of those contracts which, as already discussed, seem to have both the sole intent and effect of reducing competition. Thus, the main hypothetical, nonpecuniary gains that might be claimed for a television contract with exclusive rights provisions appear either to be nonapplicable in the present instance or have already been rejected by the Court in the NCAA case. Further, following the NCAA decision the members were told that more than one (1) exclusivity window would probably not be in compliance with the NCAA decision.

"6. Q -- Why has the time of presentation been reduced to only three and one-half hours rather than seven hours when arguably the seven-hour presentation might generate more dollars for the institutions?

"A -- It is the consensus of legal opinions available to the NCAA that a greater period than three and one-half hours would unreasonably restrict the televising of games and would therefore be illegal.

"7. Q -- May the NCAA place limitations on any time period other than the National Series time period?

"A -- No."

(Please see NCAA "Questions and Answers . . ." attached as Exhibit 11 to the Deposition of Tom Hansen and Exhibit B

hereto.)[7]

The PAC-10/Big-10/ABC contract and PTN/ESPN contract allow for at least two, and frequently more windows to be filled by these vendors. Since 1987, according to plaintiff's market study, games telecast by local broadcasters have significantly decreased.

SUMMARY OF MY "PER SE" EVALUATION

31. Although the product sold is a bit different from that usually encountered in an anti-trust case, the other features of this case resemble a standard Sherman Act, Section I conspiracy case. The sellers, the PAC-10 universities, agree to limit the sale of their product, the rights to televise their games, so as to increase their total revenue on the products sold. Parties to the contract are forbidden from selling their products under any terms other than those covered by the contract. Local television broadcasters, which are among the critical links in distribution, are prevented from acquiring the right to these games and are damaged thereby. Further, the ultimate consumers of the product, potential viewers of the local broadcasting station(s), are denied the benefits from consuming those units that would have been sold in the absence of the agreement.

THE EXCLUSIVITY PROVISIONS OF THE CONTRACTS DO NOT ACHIEVE THE STATED GOALS AND, THEREFORE, THE EXCLUSIVITY PROVISIONS ARE NON-COMPETITIVE BASED UPON THE

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[7] Mr. Hansen was a member of the NCAA Division I-A Football Television Planning Subcommittee that prepared Exhibit B attached to my Declaration (Deposition of Tom Hansen, p. 49, line 10-p. 50, line 8)

"RULE OF REASON" TEST

The Purported Existence of Efficiency Gains from the Contract

31. In paragraphs 9 and 10 of his Declaration, Professor Ordover argues in favor of the application of the rule of reason in this case on the grounds that there are significant efficiency gains from the PAC-10/Big-10/ABC and PTN/ESPN contracts. He mentions three possible efficiencies:

(a) "By pooling their games together, the colleges are able to offer the television networks a portfolio of games, the desirability of which varies from school to school, year to year, and often during a season.

(b) "Clear transaction cost efficiencies.

(c) "The ability of lesser known schools to contract with their better known rivals gives them opportunities for access to nationwide or regional audiences that might not otherwise be present."

32. ABC, PTN, ESPN or any other network, could achieve the first goal without including a time window exclusivity provision. It could negotiate a contract with the PAC-10 or Big-10 which would allow head to head competition with games involving PAC-10 members which were not playing in the game(s) selected to be broadcast by one of these networks. This would allow the market place to determine which games would be televised based on viewer and advertiser demand. That a free market would decrease revenues to the networks and the conferences is not a reasonable justification for contracts which inhibit competition. Further, the networks could negotiate with the individual colleges and create an even larger portfolio of games. (Ordover Deposition,

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p. 150, lines 6-15)

33. It is not clear why giving lesser known schools access to national or regional television increases efficiency. Why is it more efficient to televise Stanford v. FSU that, for example, only 500,000 people want to watch, than UCLA v. USC 5,000,000 people want to watch? It would appear that Professor Ordover is invoking the "competitive balance" argument that the Court rejected in the NCAA case, which does not strike me as an efficiency argument. At any rate, ABC and its affiliates do not seem to perceive these efficiencies from its contract in the same way that Professor Ordover does. ABC does not commit itself to broadcast a particular game until twelve days before it is played precisely so that it has the flexibility to put on UCLA v. USC, if they are highly ranked, or some other game if they are not.

34. The goal of giving lesser known schools access to television would appear to be better served by removing the exclusivity clause from the contracts. Then if ABC chose to broadcast UCLA v. USC, and FSU was scheduled to play at Stanford at the same time, that game could also be televised if there was enough local or regional interest in it to induce some station(s) to televise it.

35. This leaves transaction costs efficiencies. Following the NCAA decision in 1984, there was a short interval in which colleges were free to contract individually with stations and networks for the rights to televise their games. Comments before the FCC by The Association of Independent Television Stations report that 190 games were carried by independent stations in

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1984, about four times the number carried by ABC the previous year in its contract with the NCAA. This finding is corroborated by the market study conducted by plaintiff mentioned above. If transaction cost savings from writing a single television contract with a consortium of colleges rather than individual contracts with each college were significant, I would not expect such a dramatic increase in the number of games televised in the high-transaction-costs post NCAA period. Even Dr. Ordover has admitted that exclusivity provisions are not necessary to achieve savings on transaction costs (although they may be beneficial). (Ordover Deposition, p. 14, lines 19-25, p. 142, lines 2-8)

36. Let us suppose for argument's sake, however, that all three of the efficiencies claimed by Professor Ordover for the PAC-10/Big-10/ABC and PTN/ESPN contracts exist and that together they are not inconsequential. Even then one cannot justify the form of contract that exists between the PAC-10, Big-10 and ABC or the PTN/ESPN contract. All of the claimed efficiencies would be realized with a contract that stipulated (a) that ABC would broadcast x games and PTN (ESPN) y games per year, (b) ABC/PTN (ESPN) had first refusal on all PAC-10 games, and (c) any PAC-10 school was free to contract for the televising of any of its games that ABC-PTN chose not to broadcast. Such a contract would allow ABC, PTN and ESPN to achieve all of the efficiency advantages of creating a portfolio of PAC-10 games. Of course, if a school like Stanford were to contract separately for the televising of one of its games not shown on ABC/PTN/ESPN, it would bear the extra transaction costs involved. But presumably it would only do so if it was more than compensated for these

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costs by the broadcaster. The contracting parties would, of course, be free to make any provisions for televising the games of lesser schools a part of their contract that they chose. The only substantive difference between these hypothetical contracts and the ones currently in effect would be the absence of the time window exclusivity provisions. The absence of these clauses would make the contract less lucrative for ABC, PTN, ESPN and thus, less lucrative for the PAC-10 and Big-10, but this reduction in value would not be because of any loss in the efficiencies generated by the present contract, but rather from the removal of its anti-competitive effect.

THE JOINT VENTURE ANALOGY

37. Professor Ordover draws an analogy between the PAC-10/Big-10/ABC contract and PTN/ESPN contracts and a joint venture contract, like the one to establish technical standards for HDTV (paragraph 12). He correctly points out that when a contract among competitors or potential competitors has as its primary objective and effect an increase in efficiency, and only an incidental or hypothetical effect on competition, it should be allowed to stand. Conversely, let me emphasize that a contract among competitors that is primarily concerned with prices and quantities, and which has the effect of restricting quantity to raise price, is the kind of anti-competitive contract which should be disallowed.

38. The contract among the 10 universities that has created the PAC-10 Conference might be regarded as an example of the kind of joint venture that primarily increases efficiency. The universities, their students and alumni, their fans and

neighboring communities all conceivably benefit from the agreement establishing a common league, schedule of games, the Rose Bowl appearance and so on. But this suit does not challenge the PAC-10's existence. It challenges the contracts like those between the PAC-10, Big-10 and ABC, PAC-10 and PTN/ESPN. These contracts are not about generating efficiencies. They are about prices and quantities, in particular about the quantity of games to be broadcast on ABC, PTN or ESPN and the revenue that the PAC-10 receives from this sale, and most importantly about the quantity of games the PAC-10 members cannot sell and the anti-competitive effect on local broadcasters, and their viewers, as a direct result thereof. These are contracts primarily about regulating competition among PAC-10 schools in the television rights market.

THE IMPORT OF THE FTC'S FAILURE TO ACT

39. Professor Ordover cites the FTC's failure to challenge the PAC-10/Big-10/ABC contract, while at the same time challenging the CFA/ABC contract, as evidence of a lack of harmful competitive effects in the PAC-10/Big-10/ABC contract. First of all, Professor Ordover's conclusion that the FTC shared his view that the PAC-10/Big-10 agreement did not unreasonably restrict competition appears to be pure speculation based upon his deposition testimony:

> "Q Sir, do you have any factual basis upon which to conclude that the reason they dropped the investigation of the PAC-10 was because they shared your conclusion, as opposed to some other reason?
>
> "A No."